

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANN OTSUKA; JANIS KEEFE; CORINNE  
PHIPPS; and RENEE DAVIS, individually and  
on behalf of all others similarly situated,

Plaintiffs,

v.

POLO RALPH LAUREN CORPORATION, et  
al.,

Defendants.

No. C 07-02780 SI

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR CLASS CERTIFICATION**

Plaintiffs have filed a motion for class certification. The motion is scheduled for hearing on July 11, 2008. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument, and hereby VACATES the hearing. Having considered the arguments of the parties and the papers submitted, and for good cause shown, the Court hereby GRANTS plaintiffs' motion to certify the class.

**BACKGROUND**

The subject of this litigation is an employment dispute over unpaid wages brought by former retail sales employees against defendants Polo Ralph Lauren Corporation, Polo Retail, LLC, Polo Retail Corporation, and Fashions Outlet of America, who operate 28 full-price and outlet stores in the state of California. On May 30, 2006, plaintiffs Ann Otsuka, Janis Keefe, Corrine Phipps, and Justin Kiser filed a putative class action complaint in state court against defendants. Defendants removed the action to federal court on May 29, 2007, on grounds that this Court has either diversity jurisdiction or jurisdiction

1 pursuant to the Class Action Fairness Act. The complaint was amended multiple times in order to add  
2 named plaintiff Renee Davis, remove plaintiff Kiser, and make other adjustments, such that the  
3 operative complaint is now the Third Amended Complaint (“TAC”), which was filed by stipulation of  
4 the parties in March 2008.

5 Plaintiffs have brought suit on behalf of all former California employees of defendants who  
6 worked as sales associates or cashiers and were injured by defendants’ violation of employment laws  
7 from May 30, 2002 to the present. TAC at ¶ 10, 43. The gravamen of the complaint is that defendants  
8 failed to provide rest breaks, failed to pay employees for off-the-clock time spent inside the stores,  
9 improperly classified all sales associates as commission salespeople who are exempt from premium  
10 overtime compensation, and improperly used an arrears program in which sales associates who did not  
11 meet minimum commission requirements were subject to reduced earnings on future commissions above  
12 the minimum requirements. Plaintiffs contend that defendants use a single employee handbook for all  
13 California stores, and that defendants’ policies and practices are standardized throughout California in  
14 both retail and outlet stores. *See, e.g.*, TAC at ¶ 45. One of these practices, plaintiffs contend, is to  
15 discourage or prevent employees from taking required rest breaks. *See, e.g.*, TAC at ¶ 35, 41. Another  
16 practice is to conduct loss-prevention inspections (i.e. bag checks for stolen merchandise) on all  
17 employees every time they leave the store, such as at the end of their shifts or to take lunch breaks. *See,*  
18 *e.g.*, TAC at ¶ 11; Kitchin Decl. ex. 12 at 25 (2002 employee handbook describing the required  
19 inspections). Plaintiffs allege that these inspections only occur after an employee has clocked out, and  
20 that employees often have to wait for 10-15 minutes, and sometimes longer, for a manager to show up  
21 at the back door to conduct the inspection. TAC at ¶¶ 27, 34, 40. Plaintiffs also allege that defendants  
22 treated all salespeople at retail stores as exempt from overtime compensation, even though many such  
23 employees did not sell enough merchandise to be considered exempt commissioned employees, and  
24 failed to conduct the promised “reconciliations” to determine whether the employees actually were  
25 exempt. TAC at ¶ 11. These allegations are supported in large part by deposition testimony of the  
26 named plaintiffs and by declarations filed by absent class members, though competing declarations  
27 contesting many of these allegations have been filed by current employees on behalf of defendants.

28 The complaint alleges the following causes of action on behalf of all members of the putative

1 class: failure to pay wages, including overtime wages; breach of contract; failure to pay all wages due  
2 upon separation from employment; failure to provide rest breaks; failure to maintain accurate pay  
3 records; and unfair business practices. The complaint also alleges additional causes of action on behalf  
4 of two subclasses of plaintiffs. The first subclass consists of former sales associates who were  
5 misclassified as exempt from premium overtime compensation (“the misclassified subclass”), while the  
6 second subclass consists of former sales associates who were required to participate in the arrears  
7 program (“the arrears subclass”).<sup>1</sup> The complaint alleges a cause of action for fraud for the misclassified  
8 subclass and a cause of action for violation of California Labor Code § 221 for the arrears subclass.

9 Plaintiff Otsuka worked as a sales associate at the Palo Alto retail store in 2004. She alleges that  
10 defendants denied her overtime compensation, required her to participate in the arrears program,  
11 required her to wait for bag inspections without compensation, and discouraged her from taking rest  
12 breaks. *See* TAC at ¶¶ 13-20. Plaintiff Phipps worked as a sales associate at the San Francisco retail  
13 store in 2004. She alleges that defendants denied her overtime compensation, required her to participate  
14 in the arrears program, and required her to wait for bag inspections without compensation. *See* TAC  
15 at ¶¶ 21-27. Plaintiff Keefe worked as a sales associate at the San Francisco retail store in 2004 and  
16 2005. She alleges that defendants denied her overtime compensation, required her to participate in the  
17 arrears program, required her to wait for bag inspections without compensation, and discouraged her  
18 from taking rest breaks. *See* TAC at ¶¶ 28-35. Plaintiff Davis worked at the Cabazon factory outlet  
19 store in 2002, 2003, and 2004. She alleges that defendants did not pay all overtime compensation due  
20 to her, required her to participate in the arrears program, required her to wait for bag inspections without  
21 compensation, and discouraged her from taking rest breaks. *See* TAC at ¶¶ 36-42. All named plaintiffs  
22 except Otsuka now move for class certification.

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26 <sup>1</sup> In fact, the Third Amended Complaint explicitly mentions only the misclassified subclass, not  
27 the arrears subclass. *See* TAC at ¶ 43. The complaint does address the arrears program, however, and  
28 it also makes clear that additional subclasses are contemplated. *Id.* ¶ 44 (“The Class definition may be  
further defined or modified in Plaintiffs’ motion for class certification, depending on additional  
information obtained through ongoing discovery.”).

**LEGAL STANDARD**

The decision whether to certify a class is committed to the discretion of the district court within the guidelines of Federal Rule of Civil Procedure 23. *See Cummings v. Connell*, 316 F.3d 886, 895 (9th Cir. 2003). A court may certify a class if a plaintiff demonstrates that all of the prerequisites of Rule 23(a) have been met, and that at least one of the requirements of Rule 23(b) have been met. *See Fed. R. Civ. P. 23*; *see also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). A class may be certified only “if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.” *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364 (1982). The burden is on the plaintiff to establish that the Rule 23(a) and Rule 23(b) requirements have been met. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

Rule 23(a) provides four prerequisites that must be satisfied for class certification: (1) the class must be so numerous that joinder of all members is impracticable; (2) questions of law or fact exist that are common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *See Fed. R. Civ. P. 23(a)*. A plaintiff must also establish that one or more of the grounds for maintaining the suit are met under Rule 23(b), including: (1) that there is a risk of substantial prejudice from separate actions; (2) that declaratory or injunctive relief benefitting the class as a whole would be appropriate; or (3) that common questions of law or fact predominate and the class action is superior to other available methods of adjudication. *See Fed. R. Civ. P. 23(b)*.

In determining the propriety of a class action, the question is not whether the plaintiff has stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (citing *Miller v. Mackey Int'l, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971)). The Court is obliged to accept as true the substantive allegations made in the complaint. *See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982); *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). However, it “need not blindly rely on conclusory allegations which parrot Rule 23 requirements [and] may . . . consider the legal and factual issues presented by plaintiff’s complaints.” 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 7.26 (3d ed. 1992); *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744

(5th Cir. 1996).

## DISCUSSION

Plaintiffs move to certify a class of all former sales associates and cashiers who worked for defendants in California from May 20, 2002 through the conclusion of this action. Plaintiffs also move to certify the misclassified subclass as well as the arrears subclass. Defendants vigorously object to class certification, arguing that plaintiffs fail to meet almost every requirement of Rule 23 for the main class and the two subclasses. As discussed below, however, defendants' arguments primarily dispute the merits of plaintiffs' claims and raise questions of fact that will not be resolved at this juncture, and the Court finds that class certification is appropriate because plaintiffs have satisfied the requirements of Rule 23(a) and Rule 23(b)(3).

### I. Rule 23(a)

As mentioned above, "Rule 23(a) establishes four prerequisites for class action litigation, which are: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation." *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2004). Plaintiffs have demonstrated that each is present here.

#### A. Numerosity

Plaintiffs argue that the proposed main class consists of an estimated 5,300 former cashiers and sales associates. Defendants concede that this number of plaintiffs meets the numerosity requirement, and the Court agrees. *See, e.g., Immigrant Assistance Project of the L.A. County Fed. of Labor v. INS*, 306 F.3d 842, 869 (9th Cir. 2002) (finding that district court did not abuse discretion in certifying class of approximately 11,000 and stating that "[c]ourts have certified classes with far fewer members").

Plaintiffs argue that the misclassified subclass consists of approximately 69 former sales associates and possibly as many as 294 people, depending on the test used to determine whether the sales associates were misclassified. Plaintiffs also argue that the arrears subclass consists of approximately 49 members. Defendants contend that these subclasses are insufficiently numerous and that joinder is not impracticable as a result of their size. The Court disagrees. The Ninth Circuit has

1 held that as few as 39 members may be sufficiently numerous under the right circumstances, *Jordan v.*  
2 *Los Angeles County*, 669 F.2d 1311, 1319-20 (9th Cir. 1982), *rev'd on other grounds*, 713 F.2d 503 (9th  
3 Cir. 1983), and the Court finds that the spread of the subclasses throughout California, the likely small  
4 size of the damages claimed by the subclasses, and the fact that the subclass members are also members  
5 of the larger class, all suggest that the subclasses, though small, meet the numerosity requirement of  
6 Rule 23(a).

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8 **B. Commonality**

9 Under Rule 23(a)(2), there must be “questions of law or fact common to the class.” In the Ninth  
10 Circuit, the commonality requirement “has been construed permissively,” such that “[t]he existence of  
11 shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts  
12 coupled with disparate legal remedies within the class.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019  
13 (9th Cir. 1998). Plaintiffs persuasively argue that many questions of law and fact are common to the  
14 class, such as whether: (1) defendants’ policy of not compensating employees for time spent waiting for  
15 loss-prevention inspections violates California law or constitutes an unfair business practice; (2) time  
16 spent waiting for these inspections was “postliminary” or *de minimis*, and whether these federal  
17 standards would even apply to plaintiffs’ California law claims; (3) defendants breached their contracts  
18 with class members by failing to compensate them for time spent awaiting loss prevention inspections;  
19 (4) defendants had a policy of not providing or discouraging rest breaks; (5) defendants violated  
20 California law by failing to pay employees one hour’s wage when rest breaks were not provided; (6)  
21 defendants failed to maintain accurate pay records as a result of these alleged labor code violations; and  
22 (6) whether defendants’ failure to maintain accurate records was knowing and intentional. As these  
23 questions suggest, plaintiffs have sufficiently demonstrated that the commonality requirement of Rule  
24 23(a) has been met with respect to the main class.

25 As for the subclasses, plaintiffs argue that there are common questions of law and fact posed by  
26 the claims of the misclassified subclass, such as whether defendants misclassified sales associates,  
27 whether defendants committed fraud by promising sales associates that they would perform  
28 “reconciliations” to determine whether the associates were entitled to overtime compensation, and

1 whether defendants' policy of treating all sales associates as exempt employees constituted an unfair  
2 business practice. Defendants dispute the merits of the claims raised by the misclassified subclass, but  
3 do not explain why plaintiffs have failed to demonstrate that these questions are common to every  
4 member of the misclassified subclass.

5 Plaintiffs also argue that the arrears subclass meets the commonality requirement because the  
6 claims brought by this subclass raise common questions, such as whether the arrears program violated  
7 California law and constituted a breach of the employment agreement set forth in defendants' employee  
8 handbooks. In response, defendants raise questions with regard to the merits of plaintiffs' arrears claims  
9 – questions the Court does not and need not reach today – and also argue that the breach of contract  
10 claim would turn on individual questions about what each subclass member was told about the arrears  
11 program. Even if defendants are correct that individual inquiries would need to be made with regard  
12 to whether the terms of the program were misrepresented to plaintiffs, this in no way detracts from the  
13 common questions presented by the subclass claims, such as whether the program on the whole violated  
14 California law and whether the terms of the program had to be presented in writing. For these reasons,  
15 the Court finds that the commonality requirement has been met with regard to the two subclasses.

### 16 17 **C. Typicality**

18 Rule 23(a)(3) examines the class representatives and asks whether “the claims or defenses of the  
19 representative parties are typical of the claims or defenses of the class.” As the Ninth Circuit has  
20 explained, “[u]nder the rule’s permissive standards, representative claims are ‘typical’ if they are  
21 reasonably co-extensive with those of absent class members; they need not be substantially identical.”  
22 *Hanlon*, 150 F.3d at 1020; *see also Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001). Plaintiffs  
23 argue that the claims of the class representatives are typical of the main class because Keefe, Phipps,  
24 and Davis all should have been compensated for time spent waiting for loss-prevention inspections and  
25 missed rest breaks. Defendants do not take issue with the typicality of the representatives with regard  
26 to the loss-prevention inspections, but do argue that the rest break claims of the named plaintiffs are not  
27 typical of the class because Phipps testified that she took rest breaks, Davis testified that she missed only  
28 25% of her rest breaks, and Davis worked at an outlet store rather than a full-priced Polo store. The



1 Court finds that although Phipps may be unable to assert rest break claims, the other representatives  
2 allege that they were forced or coerced to skip rest breaks as part of a culture – alleged to exist at both  
3 outlet stores and full-priced stores – that discouraged the taking of rest breaks, and thus they meet the  
4 test for typicality. Although absent class members may have missed more or fewer rest breaks than the  
5 named plaintiffs, all were subjected to the same alleged policies with regard to rest breaks, and any  
6 individual differences in the number of breaks missed is a question that can be addressed if and when  
7 the amount of damages is determined.

8 Plaintiffs also argue that Phipps and Keefe are members of both subclasses and have claims that  
9 are typical of the subclasses. Defendants make no argument with regard to the arrears subclass, and the  
10 Court finds that Phipps’ and Keefe’s arrears-based claims are typical of the claims of the arrears  
11 subclass. As for the misclassified subclass, defendants argue that Phipps and Keefe do not have claims  
12 for unpaid overtime wages based on misclassification because defendants performed a reconciliation  
13 in 2007 in which the amount of overtime owed to Phipps and Keefe was determined and paid to them.  
14 *See* Cohen Decl. at ¶¶ 13-20; *id.* at ex. A. The Court disagrees with defendants’ contention for two  
15 reasons. First, to the extent Phipps and Keefe are successful on their other claims, the number of  
16 overtime hours they worked may increase. Second, even though they may have been compensated for  
17 some of their overtime hours, Phipps and Keefe may still assert claims that are typical of the absent  
18 subclass members, such as the claim that defendants committed fraud by failing to conduct annual  
19 reconciliations or the claim that defendants engaged in an unfair business practice by treating all sales  
20 associates as exempt. Thus, the claims of the class representatives who are members of the subclasses  
21 are “reasonably co-extensive with those of absent class members,” *Hanlon*, 150 F.3d at 1020, and the  
22 Court finds that plaintiffs have satisfied the typicality requirement with regard to the misclassified  
23 subclass.

#### 24 25 **D. Adequacy of representation**

26 Finally, under Rule 23(a)(4), plaintiffs must demonstrate that “the representative parties will  
27 fairly and adequately protect the interests of the class.” When considering the adequacy of a class  
28 representative, courts generally consider only two questions “(1) [d]o the representative plaintiffs and



1 their counsel have any conflicts of interest with other class members, and (2) will the representative  
2 plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Staton*, 327 F.3d  
3 at 957. Defendants’ only objection to the adequacy of the named plaintiffs and their counsel is that  
4 disagreements arose in the past between class counsel and named plaintiff Ann Otsuka. These  
5 disagreements were resolved, however, by the appointment of separate counsel for Otsuka. In addition,  
6 Otsuka is no longer involved in this case other than as an absent class member, as she has been out of  
7 touch and has not asked to be named a class representative. The Court has not been made aware of any  
8 other problems between counsel and the class representatives, and defendants do not argue that any  
9 conflicts of interest exist or that plaintiffs and their counsel will not prosecute this action vigorously.  
10 The Court therefore finds that Keefe, Phipps, and Davis will fairly and adequately protect the interests  
11 of the class and the subclasses.

## 12 13 **II. Rule 23(b)**

14 In addition to meeting the requirements of Rule 23(a), plaintiffs must also demonstrate, to the  
15 Court’s satisfaction, that at least one of the conditions of Rule 23(b) are satisfied. Here, plaintiffs argue  
16 that they satisfy Rule 23(b)(3), which provides:

17 the court finds that the questions of law or fact common to class members predominate  
18 over any questions affecting only individual members, and that a class action is superior  
19 to other available methods for fairly and efficiently adjudicating the controversy. The  
20 matters pertinent to the findings include: (A) the class members’ interests in individually  
21 controlling the prosecution or defense of separate actions; (B) the extent and nature of  
22 any litigation concerning the controversy already begun by or against class members; (C)  
23 the desirability or undesirability of concentrating the litigation of the claims in the  
24 particular forum; and (D) the likely difficulties in managing a class action.

25 Fed. R. Civ. P. 23(b)(3). Defendants argue that common questions do not predominate over individual  
26 questions and that a class action is not a superior vehicle for bringing plaintiffs’ claims. For the  
27 following reasons, the Court disagrees.

### 28 **A. Predominance**

Under Rule 23(b)(3), plaintiffs must show that common questions of law and fact “predominate  
over any questions affecting only individual members.” This “inquiry tests whether proposed classes

1 are sufficiently cohesive to warrant adjudication by representation.’’ *Hanlon*, 150 F.3d at 1022 (quoting  
2 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). The predominance analysis goes beyond  
3 the commonality requirement of Rule 23(a)(2) because it assumes the existence of common questions  
4 of law or fact and probes the relationship between these common questions and questions that arise  
5 based on the individual differences between class members. *See id.*

6 Plaintiffs argue that common questions of law and fact predominate over individual questions  
7 because all of plaintiffs’ claims address policies and procedures that defendants implement across the  
8 board at each of their California stores. These common questions include whether defendants’ failure  
9 to compensate employees for time spent waiting for loss-prevention inspections violates California law,  
10 whether defendants discouraged employees from taking rest breaks and unlawfully failed to compensate  
11 them when rest breaks were skipped, and whether, if the first two questions are answered in plaintiffs’  
12 favor, defendants violated other sections of the labor code by, for example, intentionally or  
13 unintentionally keeping inaccurate pay records. Defendants, meanwhile, contend that individual  
14 questions predominate, but defendants support this contention primarily by advancing arguments that  
15 either address the legal merits of plaintiffs’ claims or contest plaintiffs’ factual allegations. As to the  
16 rest break claims, defendants first suggest that California law does not require them to *ensure* that all  
17 employees take rest breaks, only that they *provide* rest breaks. This disputed question of California law,  
18 of course, is itself a common issue of overriding importance in this action and, in any case, plaintiffs  
19 do in fact allege that defendants failed to provide rest breaks because defendants had a policy or practice  
20 of preventing or discouraging rest breaks. *See* TAC at ¶¶ 35, 41, 88-89; *see also* Kitchen Decl. ex. 111  
21 at ¶ 10 (declaration of a department manager regarding the discouragement of taking rest breaks).  
22 Defendants also argue that their policy is to provide rest breaks and that the employees who did not take  
23 rest breaks voluntarily waived them. *See* Defendants’ Opposition at 16 n.10 (citing declarations by  
24 defendants’ employees who either took rest breaks or voluntarily chose not to take them); *but see*  
25 Kitchen Decl. at exs. 55, 57, 71, 74, 75, 82, 83, 112 (declarations by absent class members regarding  
26 the lack of rest breaks and the reasons rest breaks were often skipped). This, too, poses a common  
27 question of fact regarding whether defendants had such a policy. While this contention does, as  
28 defendants argue, pose individual questions about why particular employees may have failed to take rest

1 breaks and whether certain stores may have encouraged breaks while other stores discouraged them, the  
2 Court finds that these individual questions are secondary to the larger questions raised about whether  
3 defendants had an overall policy with regard to rest breaks and whether they are liable for missed rest  
4 breaks regardless of the reasons they were missed.

5 As to plaintiffs' claim for off-the-clock wages, defendants argue that because, under federal law,  
6 time spent waiting for loss-prevention inspections is not compensable if it was *de minimis*, see *Lindow*  
7 *v. United States*, 738 F.2d 1057, 1062-63 (9th Cir. 1984), common questions do not predominate  
8 because in order to show that any waiting time was not *de minimis*, plaintiffs necessarily will get bogged  
9 down in individual questions about how long each class member had to wait for bag inspections after  
10 clocking out. Here, again, defendants actually raise a significant question of law that is common to all  
11 class members: whether the *de minimis* rule, derived from federal law, applies to plaintiffs' claims,  
12 which arise under California law. In addition, if, as plaintiffs argue, the *de minimis* rule does not apply  
13 here, then the most significant questions will still be whether plaintiffs were made to wait for inspections  
14 without compensation and whether this off-the-clock time is compensable, questions that are common  
15 to all class members. On the other hand, if defendants are correct that the *de minimis* rule applies to off-  
16 the-clock claims brought under California law, then the question whether the time spent by plaintiffs  
17 was *de minimis* will still raise other common questions, such as the "difficulty of recording small  
18 amounts of time for payroll purposes" and the regularity with which sales associates and cashiers were  
19 made to wait for bag inspections. See *id.* Thus, while defendants are correct that the application of the  
20 *de minimis* rule might require inquiries into the individual experiences of class members, these  
21 individual questions will arise only after significant common questions of law and fact have been  
22 answered, and may not arise at all in the liability context.<sup>2</sup> The Court therefore finds that, as to the main  
23 class, common questions predominate over individual questions. See *Hanlon*, 150 F.3d at 1022 ("When  
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25 <sup>2</sup> To the extent that these individual questions regarding the amount of time each class member  
26 waited for bag inspections – as well as individual questions regarding the number of missed rest breaks  
27 – will arise in the damages context, the Ninth Circuit has explained that they will not adversely affect  
28 plaintiffs' ability to demonstrate the predominance of common questions. See *Blackie*, 524 F.2d at 905  
("The amount of damages is invariably an individual question and does not defeat class action  
treatment."); see also *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands*, 244  
F.3d 1152, 1163 (9th Cir. 2001).

1 common questions present a significant aspect of the case and they can be resolved for all members of  
2 the class in a single adjudication, there is clear justification for handling the dispute on a representative  
3 rather than on an individual basis.”).

4 As to the subclasses, defendants do not seriously contend that common questions of fact or law  
5 do not predominate over individual questions. As discussed above, there are multiple common  
6 questions, of primary importance, raised by the claims asserted by the misclassified and arrears  
7 subclasses, and the Court therefore finds that common questions predominate for the subclasses as well.  
8

### 9 **B. Superiority**

10 Plaintiffs must also demonstrate that a class action is “superior to other available methods for  
11 fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). “Where classwide  
12 litigation of common issues will reduce litigation costs and promote greater efficiency, a class action  
13 may be superior to other methods of litigation,” and is certainly superior “if no realistic alternative  
14 exists.” *Valentino*, 97 F.3d at 1234-35. Plaintiffs argue that a class action is a superior vehicle for  
15 bringing their claims because it will further the interests of judicial economy and will facilitate  
16 meaningful access to redress for the class members, many of whom might not otherwise attempt to  
17 litigate their relatively small wage and hour claims against defendants. Defendants argue in response  
18 that plaintiffs could easily bring small claims actions or file complaints with California’s Department  
19 of Labor and Standards Enforcement, either of which would be less onerous alternatives to filing  
20 individual suits in state or federal court. While the Court agrees with defendants that the class members  
21 certainly could file such claims, the Court finds that it would be far more efficient and far less costly  
22 to litigate their claims in a class action. *See Wiegele v. FedEx Ground Package Sys., Inc.*, 2008 WL  
23 410691, \*11 (S.D. Cal. Feb. 12, 2008) (“Here, it would be far more costly and time consuming for each  
24 individual putative class member to seek and compel discovery of Defendants’ policies and procedures,  
25 take multiple depositions, retain experts, and litigate damages issues. For these reasons, Courts often  
26 certify class actions when employer wage and hour practices similarly impact a large number of  
27 workers.”); *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 614 (C.D. Cal. Jan. 20, 2005) (noting  
28 that “courts have not hesitated to certify class actions for wage and hour claims simply because

1 California law provides for administrative relief.”). The Court also agrees with plaintiffs that, left to  
2 bring their own claims, many plaintiffs may choose not to do so given the potentially small individual  
3 recoveries and the possibility that many class members may not be aware that defendants may owe them  
4 additional compensation. This potential loss of access to the courts also supports plaintiffs’ argument  
5 that a class action is superior to other available methods of resolving plaintiffs’ claims. *See Tierno v.*  
6 *Rite Aid Corp.*, 2006 WL 2535056, \*12 (N.D. Cal. Aug. 31, 2006).

7 Looking to the other factors laid out in Rule 23(b)(3), the Court finds nothing to warrant a  
8 finding that resolution on a class-wide would be inferior to other methods. Defendants do not argue,  
9 and there is no indication, that class members seek to individually control their cases or that there would  
10 be an advantage to doing so. Defendants also do not argue that this particular forum is undesirable for  
11 any reason, or that it would be difficult to manage a class action in this case. Finally, while plaintiffs  
12 acknowledge that one former named plaintiff has filed an individual claim in state court, the Court does  
13 not find that this single action suggests that a class action is not the superior method for resolving  
14 plaintiffs’ claims.

### 15 CONCLUSION

16 For the foregoing reasons and for good cause shown, the Court hereby GRANTS plaintiffs’  
17 motion for class certification, and certifies the following class:


18 All former sales associates and cashiers who were employed in defendants’ retail and  
19 outlet stores in the state of California between May 30, 2002 and the conclusion of this  
20 action.

21 The Court also certifies the following subclasses:

- 22 1. All members of the class who were sales associates and were misclassified as exempt inside  
23 commissioned salespeople.
- 24 2. All members of the class who were sales associates from whom defendants took back earned  
25 wages through its arrears program.

26 **IT IS SO ORDERED.**

27 Dated: July 8, 2008

28   
SUSAN ILLSTON  
United States District Judge